DEPARTMENT OF STATE REVENUE

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Letter of Findings: 09-0827
Gross Retail Tax
For 2006 through 2008

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ISSUES

I. Time and Material Contracts – Use Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); 45 IAC 2.2-2-2.

Taxpayer argues it is not subject to use tax on tangible personal property acquired from various contract vendors on the ground that it was the vendors' responsibility to collect the tax at the time of the original transactions.

II. Electronic Database Technologies – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); 45 IAC 2.2-4-1; Sales Tax Information Bulletin 8 (May 2002).

Taxpayer argues that its purchases of certain computer-based information technologies were not subject to the gross retail tax.

III. Tax Administration – Ten-Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(4); IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer asks that the Department of Revenue abate the ten-percent negligence.

STATEMENT OF FACTS

Taxpayer is an Indiana car dealership organized as an S corporation. The Department of Revenue (Department) conducted an audit review of Taxpayer's tax and business records. The audit resulted in the assessment of additional sales and/or use tax. Taxpayer disagreed with certain portions of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Time and Material Contracts – Use Tax.

DISCUSSION

Taxpayer engaged the services of contractors who performed general repairs on Taxpayer's property. The contractors billed Taxpayer on a "time and material" basis. In other words, the contractors distinguished the cost of tangible personal property and the cost of labor on each invoice. On certain of these invoices, the contractors failed to charge sales tax for the personal property portion of the bill. As a result, the audit assessed Taxpayer for use tax.

Taxpayer disagrees on the ground that the contractors "are responsible for collecting and remitting the sales tax and taxpayer should not be held responsible." In support of its argument, Taxpayer cites to 45 IAC 2.2-2-2 which states in part that, "The retail merchant, acting as an agent for the state of Indiana, must collect the tax." In effect, taxpayer concludes that if the vendor failed to collect the tax, the Department is precluded from collecting that amount from the purchaser.

As a threshold issue, it is the Taxpayer's responsibility to establish that the proposed tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

Specifically, IC § 6-2.5-2-1 provides as follows:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2(a) provides for the complementary use tax:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Taxpayer is correct in that 45 IAC 2.2-4-22 requires contractors to collect sales tax when they sell tangible

personal property on a "time and material[s] contract." The regulation states that, "A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department." However, having failed to pay sales tax at the time of the original transactions, Taxpayer comes within the ambit of Indiana's complementary use tax. Taxpayer acquired tangible personal property, the property was acquired in a retail transaction, and the transactions were not exempt; under IC § 6-2.5-3-2(a), the audit correctly determined that the Taxpayer owed additional use tax on these items. The fact that the sales tax was originally collected does not relieve taxpayer from the responsibility of paying use tax.

FINDING

Taxpayer's protest is respectfully denied.

II. Electronic Database Technologies – Gross Retail Tax.

DISCUSSION

The audit found that taxpayer had purchased "on-line database subscriptions" from various vendors but that no sales or use tax was paid. The audit cited to 45 IAC 2.2-4-1 for support of its position that the purchases were subject to tax. In relevant part, the regulation states that, "Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a 'retail merchant.'" 45 IAC 2.2-4-1(a).

A. Car-Fax. Taxpayer argues that invoices received from CarFax are not subject to sales tax. Based on the information supplied by Taxpayer, it is not possible to determine whether taxpayer was paying for reports, access to a library of collected information, computer software, or simply a "service." Taxpayer has provided what seems to be an invoice from Carfax, but the face of the invoice does not clearly establish what it was taxpayer was buying or what it was that Carfax was selling. Under IC § 6-8.1-5-1(c), Taxpayer has failed to meet its burden of demonstrating that any assessment of use tax was incorrect.

B. First Advantage Credit Check Credco. Taxpayer argues that invoices received from Credco Services are not subject to sales or use tax. The information provided by taxpayer suggests that taxpayer is purchasing "Credit Reports." The information also suggests that Credco supplies "one-stop access to credit reports." However, the information also suggests that what taxpayer is purchasing is merely a "service." Not having access to the original, underlying agreement between Taxpayer and this particular vendor, it is not possible to determine what it is that taxpayer is buying and what Credco is selling. Again, is this a service, the sale of tangible personal property, or access to credit information? If the information consists of "reports," it would suggest that what taxpayer purchases constitutes information "compiled by a computer [and] sold or reproduced for sale in substantially the same form as it is so produced...." Sales Tax Information Bulletin 8 (May 2002). Without more, Taxpayer's protest on this particular issue must also be denied.

D. AdvantageDealer.com. Taxpayer has provided an invoice received from AdvantageDealer.com. The invoice indicates that Taxpayer is paying a "Monthly Access Fee." In this case, Taxpayer is not paying for "statistical reports, graphs, diagrams or any other information produced or compiled by a computer...." as noted above. Instead, Taxpayer is paying a fixed amount for access to the information compiled by the vendor. In effect, Taxpayer is paying a fixed price for access to this vendor's information. Because there is no indication that taxpayer is engaged in a "retail transaction" by which it obtained tangible personal property, amounts paid to AdvantageDealer.com are not subject to sales tax.

FINDING

Taxpayer's protest denied in part and sustained in part.

III. Tax Administration – Ten-Percent Negligence Penalty.

DISCUSSION

Taxpayer believes that it is entitled to abatement of the ten-percent negligence penalty because it "has always filed a timely sales and use tax return and has always paid the entire balance due in full." According to the "Audit Progress Report," the penalty was imposed because the "Taxpayer had no use tax self-assessment policy in place prior to [the] audit" and because "Taxpayer failed to remit use tax on all taxable purchases, where sales tax was not paid to the vendor."

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(4) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty

imposed...."

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

The Department believes that taxpayer erred in determining its sales and use tax liability. However, there is insufficient information to establish that Taxpayer's position was so egregious as to constitute "willful neglect." Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department agrees that the ten-percent negligence penalty should be abated.

FINDING

Taxpayer's protest is sustained.

SUMMARY

Taxpayer owes use tax on the purchase of tangible personal property which it bought from its "time and material" vendors; except for the monthly access fees it pays to AdvantageDealer.com, taxpayer owes sales/use tax on the transactions with the "electronic database" vendors. The ten-percent negligence penalty is abated.

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